IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARRY R. SCHMOLTZE, SR. and CAROLANNE SCHMOLTZE	:	CIVIL ACTION
v.	:	
AMITY TOWNSHIP, et al.	:	NO. 99-CV-2838

MEMORANDUM

Padova, J. **March 28, 2000**

Plaintiffs Garry R. and Carolanne Schmoltze filed the instant suit against Amity Township and the nine members of the Amity Township Board of Supervisors (collectively "Board" or "Board Members")[1]. Plaintiff claims that Defendants wrongfully forced him to resign from his position as a patrol officer with the Amity Police Department in violation of 42 U.S.C. § 1983 and in breach of his employment contract.

I. BACKGROUND

In January 1997, Amity Township ("Amity") hired Garry Schmoltze ("Schmoltze") as a full-time patrol officer for the Amity Police Department. Schmoltze began work on February 3, 1997. Later that month, Schmoltze's former employer, Borough of

[1]The individual Board Members are Thomas Kirscher, Barry Gross, Mark Sheeler, George Schrierer, George Gemmel, Kathy Greenwalt, D. Gene Hofer, Jacob Oxenford, and Janis Zern.

Temple, filed criminal charges against him. As a result, on March 1, 1997, the Board placed Schmoltze on an unpaid leave of absence pending disposition of the criminal case.

According to the Complaint, Defendants initially assured Schmoltze that his employment was secure. On June 3, 1997, however, Board Member Gemmel, allegedly acting on Amity's behalf, advised Schmoltze that he would be terminated from his position at noon the next day unless he voluntarily chose to resign. On that same day, Schmoltze tendered his resignation. Prior to his resignation, David Eichelberger, an Amity employee and leader of the Police Benevolent Association, contacted Schmoltze and told him that he would be reinstated if he was acquitted of all criminal charges. On November 26, 1997, Schmoltze was acquitted of all the criminal charges against him. Defendants have nonetheless refused to reinstate Schmoltze.

II. STANDARD OF REVIEW

A claim may be dismissed under Federal Rule of Civil Procedure 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true.[2] Id.

[2]The Court, therefore, examines the sufficiency of the Complaint only as it is presently alleged. The Court will not consider new theories and factual allegations set forth for the

III. DISCUSSION

The Complaint alleges four counts: deprivation of constitutional rights pursuant to 42 U.S.C. § 1983; breach of contract; intentional infliction of emotional distress; and loss of consortium. Before the Court is Defendants' Motion to Dismiss. For the reasons stated below, the Court grants Defendants' Motion.

A. Section 1983 Claims

Count One of the Complaint alleges that Defendants violated Schmoltze's right to substantive due process in violation of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. 42 U.S.C. § 1983 provides a remedy against "any person" who, under the color of law, deprives another of his constitutional rights. 42 U.S.C. § 1983 (1994). A "person" under section 1983 includes a municipality. Monell v. Dep't of Social Services, 436 U.S. 658, 688-89 (1978). Municipal entities, however, may not be held liable for injuries inflicted solely by its employees or agents on a respondeat superior theory of liability. Id. at 691. Rather, municipalities may be held liable for violations of constitutional rights under section 1983 in only two circumstances. One situation is when the alleged unconstitutional action implements a municipal policy or practice, or a decision that is officially adopted or promulgated

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first time in Plaintiff's reply briefing.

by those whose acts may fairly be said to represent official policy. Reitz v. County of Bucks, 125 F.3d 139, 144 (3d Cir. 1997)(citing Monell, 436 U.S. at 690-91 (1978)). Alternatively, a municipality may be held liable if it fails to properly train its employees, such that the failure amounts to deliberate indifference to the rights of persons with whom its employees come into contact. Id. at 145 (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)).

The Complaint does not allege the existence of any official policy or practice by Amity. Nor does Plaintiff allege that Amity failed to train its employees. Rather, the Complaint merely states that Amity, through its agents and employees acting within the scope of their authority, deprived him of his constitutional rights. (Compl. ¶¶ 54-55). Because municipalities may not be held liable on a respondeat superior theory for the acts of its employees, the Court dismisses without prejudice Count One against Amity.

The Court also concludes that the Board Members are entitled to qualified immunity on this count. Government officials enjoy qualified immunity from suit under section 1983 so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). The defendant has the burden of pleading and proving qualified immunity. Harlow, 457 U.S. at 815.

When resolving issues of qualified immunity, a court must first determine whether the plaintiff has alleged a deprivation of a constitutional right. Torres v. McLaughlin, 163 F.3d 169, 172 (3d Cir. 1998)(citations omitted). Only after satisfying that inquiry should the court then ask whether the right allegedly implicated was clearly established at the time of the events in question. Id. To be clearly established, the contours of the right of which the plaintiff was allegedly deprived must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right. Karnes v. Skrutski, 62 F.3d 485, 492 (3d Cir. 1995).

Even if both inquiries are satisfied, if the official's actions were objectively reasonable in light of the constitutional rights at issue, the official is entitled to qualified immunity. Giuffre v. Bissell, 31 F.3d 1241, 1252 (3d Cir. 1994). If in light of pre-existing law, the unlawfulness of the official's action is apparent, the official is not entitled to qualified immunity. Anderson v. Creighton, 493 U.S. 635, 649 (1987). Objective reasonableness is measured by the amount of

knowledge available to the official at the time of the alleged violation. Id.

Plaintiff claims he was deprived of his right to employment under the Fourteenth Amendment. Neither the United States Supreme Court, nor the Court of Appeals for the Third Circuit, have held that a fundamental property interest in government employment exists and is protected by the substantive prong of the Due Process Clause of the Fourteenth Amendment. See Homar v. Gilbert, 89 F.3d 1009, 1021 (3d Cir. 1996)(remanding case to district court to decide in first instance whether public employees with state-created property interests in their jobs are protected by substantive due process); Homar v. Gilbert, 63 F. Supp. 2d 559, 576 (M.D.Pa. 1999)(reviewing trend in United States Supreme Court and Third Circuit jurisprudence and concluding that no fundamental property interest in tenured public employment exists under substantive due process). The cases that Plaintiff cites in support of his theory that public employees have a property right protected by substantive due process were overruled prior to the events in question. See McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir.), cert. denied, 513 U.S. 1110 (1995) (overruling Barnett v. Housing Auth. of Atlanta, 707 F.2d 1571 (11th Cir. 1983) and Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991) and holding that under Supreme Court precedent public employees are protected only by procedural due process).

Assuming for the purposes of this motion that Plaintiff has stated a valid property interest, the Court concludes that any viable rights under substantive due process certainly were not clearly established at the time of Defendants' alleged actions. See e.g. Hassel v. Neal, No. 96-813, 1997 WL 269575, at *4 (E.D.Pa. May 16, 1997)("It is disputable whether continued public employment implicates substantive due process concerns."); Austin v. Neal, 933 F. Supp. 444, 453 (E.D.Pa. 1996). For these reasons, the Court concludes that Defendant Board Members actions are protected by qualified immunity and dismisses with prejudice Count One against them.

B. State Law Claims

Plaintiffs' remaining counts allege claims pursuant to Pennsylvania state law. Having dismissed all of Plaintiffs' claims over which it has original jurisdiction, the Court declines to exercise supplemental jurisdiction over Counts Two, Three, and Four.[3] See 28 U.S.C.A. § 1367(c)(3) (West 1999).

In conclusion, the Court dismisses Count One against both Defendants with prejudice, and Counts Two through Four without prejudice. An appropriate Order follows.

[3]Having dismissed all of Plaintiffs' Counts for the foregoing reasons, the Court need not reach the merits of Defendants' other arguments.

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O R D E R

AND NOW, this day of March, 2000, upon consideration of Defendants' Motion to Dismiss (Doc. No. 5), and Plaintiffs' Responses thereto (Doc. Nos. 9 and 10), **IT IS HEREBY ORDERED** that Defendants' Motion is **GRANTED**. Count One is **DISMISSED** with prejudice; Counts Two, Three, and Four are **DISMISSED** without prejudice.

BY THE COURT:

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John R. Padova, J.